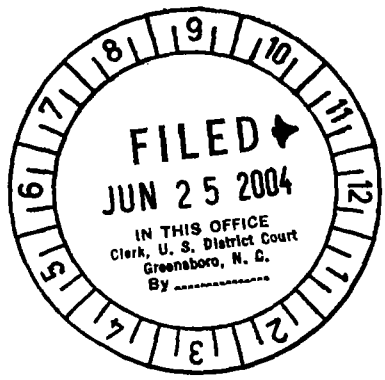
34.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



JANICE K. CARTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:03CV00134
	)	
GILBARCO/MARCONI, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Janice K. Carter filed this action against Defendant Gilbarco, Inc., asserting claims of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. Plaintiff has asked this court to permit her to voluntarily dismiss her action without prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure. Defendant has moved for summary judgment on both of Plaintiff's claims pursuant to Rule 56 of the Federal Rules of Civil Procedure. Also pending before the court are Defendant's motion for sanctions for Plaintiff's failure to appear at a scheduled mediation and Plaintiff's motion to extend time.

I. BACKGROUND

Plaintiff, a black female, began working for Defendant in 1980 in the Customer Sales and Support Department (the "CS&S Department"). During the course of her employment, Plaintiff had a number of different job titles, but essentially the same job responsibilities, which included data entry and order processing. Plaintiff's final job title was "Order Administrator."

In 2000 and 2001, Defendant suffered markedly reduced sales and began to institute cutbacks on expenses. In August 2001, Defendant determined that additional measures were necessary and implemented a company-wide reduction in force ("RIF"). Earlier in 2001, and unrelated to Defendant's desire to reduce its workforce, CS&S Department Manager Steve Moore undertook to review and reorganize the CS&S Department. Moore instructed the two "Coach/Supervisors" who worked under him to evaluate each of the employees in the department in three areas: speciality skills, generic skills, and overall. The employees received letter grades in each area ranging from "A" to "F." Plaintiff received scores of "D-," "F," and "D-" respectively, the lowest of any of the five Order Administrators. Because of the company's plans to downsize, Moore's plans to reorganize the CS&S Department, and Plaintiff's low evaluations, Plaintiff was one of two CS&S Department employees to be laid off.

Plaintiff claims that her termination was based on her race because she and the other laid-off CS&S Department employee were black, while other less experienced white employees remained. Moreover, Plaintiff has alleged that temporary white employees were hired after her termination to fulfill the same job functions Plaintiff had been performing.

The procedural history of this case is also relevant to the pending motions. In an order dated February 9, 2004, Magistrate Judge Eliason directed that all dispositive motions be filed by February 26, 2004, and that any responses to such motions be filed by March 26, 2004. Defendant made its motion for summary judgment on February 26, but Plaintiff did not file a response by March 26. Instead, on March 30, Plaintiff's counsel, Romallus O. Murphy, filed a motion for withdrawal and for a continuance to permit Plaintiff to seek other counsel. In an order dated April 7, Magistrate Judge Eliason permitted Mr. Murphy to withdraw from the case, ordered that Plaintiff either have an attorney enter an appearance on her behalf or file a notice of pro se appearance by April 20, and ordered that Plaintiff respond to Defendant's motion for summary judgment and motion for sanctions by April 23.

No attorney appeared for Plaintiff on or before April 20 nor did Plaintiff enter a pro se appearance. Instead, on April 20, Plaintiff filed a "Motion to Extend Time." It is not clear from that document whether Plaintiff was seeking an extension of time

to find an attorney or to respond to Defendant's motions. On April 22, Plaintiff filed a motion to dismiss without prejudice. Plaintiff has not responded to either of Defendant's motions.

II. PLAINTIFF'S MOTION TO DISMISS

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides for dismissal of a case on a plaintiff's motion pursuant to court order. Normally, such a motion should not be denied absent "plain legal prejudice to the defendant." Ellett Bros., Inc. v. United States Fidelity & Guar. Co., 275 F.3d 384, 388 (4th Cir. 2001); accord Davis v. USX Corp., 819 F.2d 1270, 1273 (4th Cir. 1987). In deciding such a motion, a district court should consider four nonexclusive factors: "[T]he opposing party's effort and expense in preparing for trial, excessive delay and lack of diligence on the part of the movant . . . insufficient explanation of the need for a dismissal . . . [and] the present stage of litigation." Wieters v. Roper Hosp., Inc., No. 01-2433, 2003 WL 550327, at *4 (4th Cir. Feb. 27, 2003) (quoting Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354, 358 (10th Cir. 1996) (alterations in original)). In considering the above factors, courts must "focus primarily on protecting the interests of the defendant." Davis, 819 F.2d at 1273.

This case was filed approximately 14 months before Plaintiff made her motion to dismiss. Discovery in this matter closed more than a month before the motion and the scheduled trial date of

July 6, 2004, was less than three months away. Moreover, a dispositive motion for summary judgment was already pending by the time Plaintiff made her motion. All of these factors suggest that voluntary dismissal is improper due to the advanced stage of the litigation. See St. Clair v. General Motors Corp., 10 F. Supp. 2d 523, 530-31 (M.D.N.C. 1998). Moreover, having composed a summary judgment motion and other pleadings, taken depositions, and prepared documentary discovery, Defendant has expended such time and money that dismissal would constitute prejudice. See id. at 530 (citing Andes v. Versant Corp., 788 F.2d 1033, 1036-37 (4th Cir. 1986)).

Turning to the remaining factors, nothing suggests that there has been an "excessive" delay or lack of diligence on the part of Plaintiff. Nonetheless, there has been some delay. Mr. Murphy's motion to withdraw was filed after the deadline for Plaintiff to respond to Defendant's motion for summary judgment. Plaintiff's motion to dismiss was filed after the deadline by which she was required to have counsel appear or file a notice of pro se appearance and only one day before the new, extended deadline for her to respond to Defendant's motions, which she has failed to do. Plaintiff's stated reasons for seeking dismissal primarily relate to difficulties she experienced while Mr. Murphy was representing her in February and March. These events, however, do not explain why the court should deviate from the

schedule set out in the April 7 order. Plaintiff explained to the court in a hearing held on May 26, 2004, that she had contacted some attorneys but that they were unwilling to take her case. Despite Plaintiff's difficulties in securing counsel, the court cannot permit Plaintiff another attempt to bring this case in light of the stage of the proceedings and the potential prejudice to Defendant. Plaintiff's motion to dismiss will therefore be denied. For the same reasons, Plaintiff's motion to extend time will also be denied.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate where an examination of the pleadings, affidavits, and other proper discovery materials before the court demonstrates that there is no genuine issue of material fact, thus entitling the moving party to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). The basic question in a summary judgment inquiry is whether the evidence "is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Summary judgment should be granted unless a reasonable jury could return a verdict in favor of the nonmovant on the evidence presented. McLean v. Patten

Communities, Inc., 332 F.3d 714, 719 (4th Cir. 2003) (citing Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2509-10).

When, as here, a motion for summary judgment is unopposed, this court's Local Rules state that the motion "ordinarily will be granted without further notice." LR 7.3(k). Even in such a situation, however, the court must still review the motion and determine whether the moving party is entitled to judgment as a matter of law. Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993).

B. Title VII Claim

Defendant's first ground for seeking summary judgment on Plaintiff's Title VII claim is that Plaintiff has failed to comply with the procedural rules of the statute. Specifically, Title VII requires that a plaintiff file her action within 90 days of the receipt of a right-to-sue letter from the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(f)(1); Watts-Means v. Prince George's Family Crisis Ctr., 7 F.3d 40, 42 (4th Cir. 1993). If a claim is not filed within the 90-day period, it is time barred and will be dismissed. See Watts-Means, 7 F.3d at 42.

In this case, Plaintiff's right-to-sue letter was mailed on November 5, 2002. The record is silent as to when she received the letter. When the date of receipt is unknown or in dispute, the court will presume that the letter was received three days after the mailing. Nguyen v. Inova Alexandria Hosp., No. 98-2215, 1999 WL 556446, at *3 (4th Cir. July 30, 1999); Kimes v.

Laboratory Corp. of Am., Inc., 313 F. Supp. 2d 555, 559-60 (M.D.N.C. 2004). This court will therefore presume that Plaintiff received her right-to-sue letter on November 8, 2002. As such, Plaintiff had until February 6, 2003, to file this action. Because February 6 is the date on which she filed this action,[1] her Title VII claim is not time barred.

To succeed on a claim under Title VII, a plaintiff must prove discriminatory intent on the part of the defendant. See Moore v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir. 1985). A plaintiff may prove discriminatory intent by way of direct evidence, such as statements by the defendant, or through circumstantial evidence. Id. (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3, 103 S. Ct. 1478, 1481 n.3 (1983)). In the present case, Plaintiff has presented no direct evidence of discrimination based on Plaintiff's race and as such the McDonnell Douglas burden-shifting analysis applies to her claims.

Under the McDonnell Douglas analysis, the plaintiff must make an initial evidentiary showing demonstrating a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). If established, this prima facie case then creates an inference of discrimination

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[1] Defendant asserts that Plaintiff filed her complaint on February 21, 2003. That date, however, is when Plaintiff filed her amended complaint; Plaintiff's original complaint was filed on February 6, 2003, within the 90-day period.

by the defendant, shifting the burden to the defendant to "articulate some legitimate, nondiscriminatory reason" for the action. Id. If the defendant carries this burden, "the presumption raised by the prima facie case is rebutted and 'drops from the case'" and the plaintiff must then be given the opportunity to show that the legitimate reasons offered by the defendant were "unworthy of credence," and were merely a pretext for discrimination. Dugan v. Albemarle County Sch. Bd., 293 F.3d 716, 721 (4th Cir. 2002) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981)). The plaintiff retains the ultimate burden of proving intentional discrimination. Id. (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43, 120 S. Ct. 2097, 2106 (2000)).

A plaintiff must prove the following elements to establish a prima facie case in the context of a RIF: (1) that she was a member of the protected class; (2) that she was selected for discharge from a larger group of candidates; (3) that she was performing at a level substantially equivalent to the lowest level of those employees who were retained; and (4) that the RIF selection process produced a residual work force that contained some persons outside the protected class who were performing at a level lower than that at which the plaintiff had been performing. See Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1315 (4th Cir. 1993) (applying this test in an age discrimination context); see

also Campbell v. Sandoz Pharm. Corp., No. 96-1638, 1997 WL 419277, at *2 & n.2 (4th Cir. July 28, 1997) (permitting application of the Mitchell test in Title VII cases).

In this case, the first two elements of the prima facie case are undisputed. As a black female, Plaintiff is clearly within the class protected by Title VII, and Plaintiff was selected for termination from the larger group of employees within the CS&S Department. To survive summary judgment, however, Plaintiff must still present evidence of the third and fourth elements of the prima facie case.

To establish the third element, Plaintiff must be able to show that she was "performing at a level substantially equivalent to the lowest level of those of the group retained." Mitchell, 12 F.3d at 1315. Plaintiff cannot make this showing. The evidence before the court shows that, under the evaluation system used by Moore, Plaintiff had the lowest scores of any employee in the CS&S Department in each of the three categories. Moreover, Plaintiff was the only employee to receive an "F" in any category, and no one had an overall rating lower than Plaintiff's "D-." The contrast is even more stark when comparing Plaintiff to the four other Order Administrators, none of whom received an overall score less than "C." There is no evidence, other than

Plaintiff's allegations,[2] that she was "performing at a level substantially equivalent to the lowest level of those of the group retained." Id.

Plaintiff also cannot establish the fourth element of the prima facie case because she cannot show that the RIF "produced a residual work force of persons in the group containing some unprotected persons who were performing at a level lower than that at which [she] was performing." Id. Under Defendant's

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[2] Plaintiff alleged in her complaint that she "met the defendant's expectations as a good employee," (Am. Compl. ¶ 8(b)) and that, prior to 2001, "plaintiff's performance and evaluation were consistent with [Defendant's] policy for periodic promotions and upgrade." (Id. ¶ 8(h).) Even assuming these assertions relate to the critical issue of the relative performance of Plaintiff as compared to other CS&S employees, see Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1315 (4th Cir. 1993), the fact that Plaintiff found her performance to be satisfactory does not establish the third element of Plaintiff's prima facie case, because Plaintiff's own perception of her job performance is irrelevant. DeJarnette v. Corning Inc., 133 F.3d 293, 299 (4th Cir. 1998); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 960-61 (4th Cir. 1996); Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980). When, as here, the employer has "offered substantial evidence that [Plaintiff] was not in fact meeting legitimate job performance expectations," testimony to the contrary from Plaintiff is not sufficient to establish a prima facie case of discrimination. King v. Rumsfeld, 328 F.3d 145, 149 (4th Cir. 2003) ("[W]e have long rejected the relevance of such testimony and held it to be insufficient to establish the third required element of a prima facie discrimination case."). In this case, the court is presented only with the allegations of Plaintiff's complaint, which are insufficient to establish the third element at the summary judgment stage. See Fed. R. Civ. P. 56(e) (mandating that when a motion for summary judgment is properly made and supported, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial").

system of evaluation, the four remaining Order Administrators had higher evaluation scores than Plaintiff; the same is true when considering all of the employees remaining in the CS&S Department.

In Plaintiff's deposition she described a conversation she had with another Order Administrator, Myra Osborne. Osborne resigned from Gilbarco after hearing from her supervisor, Rachel Roberts, that Osborne made more errors than any other Order Administrator. Plaintiff indicated that Roberts's statement to Osborne was made in September 2001, the month after Plaintiff had been laid off. There is no indication, however, as to the time period to which Roberts was referring. Considering that Osborne's evaluation scores ("B" overall) were notably higher than Plaintiff's, it could be that Roberts was indicating that Osborne made the most errors of any Order Administrator since Plaintiff had been terminated. The court cannot conclude from this statement that employees performing more poorly than Plaintiff remained. It is also important to note that Plaintiff was not selected for termination because she made more errors than her co-workers but because her overall evaluation scores were the lowest. This evidence is not sufficient to show that someone performing at a lower level than Plaintiff remained after Plaintiff's termination.

Even assuming Plaintiff could establish her prima facie case, Defendant has proffered a legitimate, nondiscriminatory reason for Plaintiff's selection for termination which she has failed to rebut. Defendant's evidence shows that the decision to conduct a RIF was made as an effort to reduce costs because of Defendant's declining business performance. See Williams v. Encompass, 969 F. Supp. 15, 17 (E.D.N.C. 1997) (accepting the employer's explanation of a RIF based on economic considerations), aff'd, 165 F.3d 913 (4th Cir. 1998). The decision to select Plaintiff for termination was based on her low evaluation scores, as well as Moore's plan to reorganize the CS&S Department. Plaintiff has been unable to rebut Defendant's explanation by showing that it is mere pretext. There is no evidence before the court to indicate that race played any part in the decision to terminate Plaintiff. Since Defendant has presented a legitimate, non-discriminatory reason for Plaintiff's selection for lay off and Plaintiff has been unable to rebut that reason, "it is not [the court's] province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." Hawkins v. PepsiCo, Inc., 203 F.3d 274, 279 (4th Cir. 2000) (quoting DeJarnette v. Corning Inc., 133 F.3d 293, 299 (4th Cir. 1998)). For these reasons, Defendant is entitled to judgment as a matter of law on Plaintiff's Title VII claim.

C. Section 1981 Claim

A claim of employment discrimination under 42 U.S.C. § 1981 is evaluated under the same standards as a claim under Title VII. Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 n.1 (4th Cir. 2002) (citing Gairola v. Virginia Dep't of Gen. Servs., 753 F.2d 1281, 1285 (4th Cir.1985)); Hawkins, 203 F.3d at 278; Luallen v. Guilford Health Care Ctr., No. 1:02CV00738, 2003 WL 23094916, at *4 (M.D.N.C. Dec. 18, 2003). Accordingly, Plaintiff's § 1981 claim fails for the same reasons as her Title VII claim; Defendant's motion for summary on this claim will likewise be granted.

IV. DEFENDANT'S MOTION FOR SANCTIONS

Defendant also seeks sanctions against Plaintiff in the amount of $4,504.30 for her failure to appear at a mediation scheduled for March 9, 2004.[3] According to Defendant, the parties agreed to a mediation scheduled for March 9, at 10:30 a.m., at the office of William Eagles, the appointed mediator in this matter. Plaintiff did not arrive as scheduled, and Mr. Murphy suggested a recess until 1:00 p.m. so that he might have time to locate Plaintiff. At 1:30 p.m., Plaintiff having not yet appeared, Mr. Eagles released Defendant's counsel. Mr. Eagles also advised Defendant's counsel that he would be meeting with

[3] Local Rule 83.10e(h) permits the court to impose sanctions, including attorney's fees and costs, on any person who fails to attend a mediation without good cause.

Mr. Murphy and Plaintiff on March 12, at 8:45 a.m., and asked Defendant's counsel to call Mr. Eagles's office at 9:30 that morning. Plaintiff also failed to appear at the March 12 meeting.

Defendant has requested a sanction of $4,504.30, representing $414.30 in air travel for Defendant's out-of-state counsel, $30 in airport parking expenses, $3,480 in legal fees for the day of March 9 (12 hours at $290/hour) and $580 in legal fees for preparation of the motion for sanctions (2 hours at $290/hour).

Although Plaintiff has not directly responded to this motion, she does indicate in her Motion to Extend Time, that "Attorney Murphy was the cause of me missing my mediations" (Pl.'s Mot. Extend Time at 1), an assertion she repeated in her letter terminating Mr. Murphy's services on March 10, 2004. The court does not know Mr. Murphy's position on the issue of why Plaintiff missed the mediation, but one letter Plaintiff attached to her motion from Mr. Murphy indicates that "because we missed you on Friday for the mediation, we were unable to get a response from you for attendance on Monday." (Id. Ex. 6.) It is not clear from the record why Plaintiff missed the mediation. Accordingly, the court concludes that it would not be appropriate to grant sanctions in this case and Defendant's motion will thus be denied.

V. CONCLUSION

For the reasons stated herein, Plaintiff's motion to dismiss this action without prejudice will be denied. Defendant's motion for summary judgment will be granted as to all of Plaintiff's claims. Defendant's motion for sanctions and Plaintiff's motion to extend time will also be denied.

This the 25th day of June 2004.

William L. Osteen
United States District Judge